IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1935.

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

STATE OF WASHINGTON, *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON
(184 Wash. 648, 52 Pac. (2d) 1274)

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

In correction of and in addition to appellant's statement of the case, we wish to cover certain points in a brief statement in behalf of the appellee.

Besides appellant, three other plaintiffs, railroad corporations in like circumstances, brought like actions against the State of Washington and the four cases were tried together in the superior court. (R. 55-58.)

The inspection fee clause of the United States Constitution, found in the third paragraph of Section 10, Article 1, was not pleaded by the appellants.

Appellant's statement in his brief, page 13, to the effect that appellee's testimony was admitted over objection is incorrect. It went in without objection. (R. 72.) It was only after cross-examination, when appellants learned that the testimony was not in their favor, that they moved to strike it. (R. 74.) Further examination of the witness went unchallenged. (R. 74-80.)

Prior to 1929 appellant was paying the state certain fees under two separate statutes. One of these statutes, Remington's Supplement of 1927, Section 3841, applied to all corporations doing business in the state, and imposed an annual tax or excise therefor. That statute was superseded by the Laws of 1929, Chapter 227 (Rem. Rev. Stat., Secs. 3836-1 to 3836-8) which later statute required that the regulatory fee of 1/10 of one per cent paid to the Department of Public Works should be deducted from the amount to be paid by the corporation. In the case at bar this fee exceeded the fee required by Chapter 227, Laws of 1929, to be paid to the Secretary of State by all corporations.

Upon the trial of the cases, notwithstanding the trial court's announcement that only a matter of law was involved in the cause (R. 60, 62, 63, 82), he made all findings asked by plaintiffs in each case. These findings included a brief and argument for plaintiff and were set aside by the supreme court of the state in reversing the trial court's judgment. (184 Wash. 648, 52 Pac. (2d)

1274.) (R. 91.) Exceptions to findings are not required in Washington under Court Rule XVI found in 157 Wash., page XXXIII. That rule reads as follows:

"RULE XVI.

"EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

"1. It shall not be necessary or proper, in order to obtain appellate review thereof, to take or enter an exception to findings of fact or conclusions of law of a court or judge upon a case or part of a case, either legal or equitable, tried without a jury; nor shall it be necessary to take exception to the refusal of the court to make proposed findings or proposed conclusions of law.

"2. This rule shall apply and be applicable to cases now pending as well as to those which may be hereafter instituted."

Appellant during the years 1929 to 1933, inclusive, was engaged in intrastate transportation on its railroad in the State of Washington. It was also engaged in interstate transportation over the same lines in connection with its road outside of the state. The situation in each of the years involved was the same, excepting as to amount of revenue, tax and a few minor matters. Taking the year 1933 as an example, appellant had within the state 1,929.19 miles of railway, and its total lines within and without the state amounted to 11,936.04 miles. (R. 122.) Appellant's lines in the State of Washington were worth $66,100,000 and its operating revenue within the state, including both intrastate and interstate transactions, was $8,114,350.47, of which $3,137,046.00 arose out of intrastate transactions. (R. 122.) Consequently the one-tenth of one per centum fee imposed thereon by Section 1 of Chapter 107, Laws of 1929, Rem. Rev. Stat 10417 was $3,137.04. The statute is set out on

pages 2 and 3 of appellant's brief, but for convenience we also copy it herewith and it will be found as follows:

"Section 1. That hereafter every person, firm or corporation engaged in business as a public utility and subject to regulation as to rates and charges by the department of public works, except auto transportation companies and steamboat companies holding certificates under chapter 248 of the Laws of 1927, shall, on or before the first day of April of each year, file with the department of public works a statement on oath showing its gross operating revenue for the preceding calendar year or portion thereof and pay to the department of public works a fee of 1/10 of one per cent of such gross operating revenue; *Provided,* That the fee so paid shall in no case be less than ten dollars."

No fee was paid or asked because of the interstate transactions of the appellant under this statute.

Under Chapter 227, Laws of 1929, which applies to all corporations, be they public service or otherwise in their activities, the amount of the tax or excise allocated to and charged against the appellant by the Secretary of State for the year of 1933 was the sum of $985.60. (R. 41.) For convenience we set out the material portions of that Chapter as they appear in Remington's Revised Statutes, Sections 3836-4, 3836-5 and 3836-6.

"Section 3836-4. DOMESTIC CORPORATIONS—ANNUAL LICENSE FEE—SCHEDULE. Every corporation organized under the laws of this different fee schedule, shall pay, on or before the first day of July of each and every year, to the secretary of state, for the use of the state, an annual license fee of fifteen ($15.00) dollars for the first fifty thousand ($50,000.00) dollars or less of its authorized capital stock; and one-fortieth (1/40) of one per cent (1%) additional on all amounts in excess of fifty thousand ($50,000.00) dollars, and not exceeding one million ($1,000,000.00) dollars; and one one-hundredth (1/100) of one per cent (1%) additional on all amounts in excess of one million ($1,000,000.00) dollars, and not

exceeding four million ($4,000,000.00) dollars; and one two-hundredth (1/200) of one per cent (1%) additional on all amounts in excess of four million ($4,000,000.00) dollars; but in no case shall an annual license fee exceed the sum of twelve hundred fifty ($1,250.00) dollars; * * *.

"Section 3836-5. FOREIGN CORPORATIONS—ANNUAL LICENSE FEE. All foreign corporations doing intrastate business, or hereafter seeking to do intrastate business in this state shall pay for the privilege of doing such intrastate business in this state the same fees as are prescribed for domestic corporations for annual license fees in the preceding section, such fees to be computed upon the proportion of the capital stock represented or to be represented by its property and business in this state to be ascertained by comparing the entire volume of business with the volume of intrastate business in this state * * *.

"Section 3836-6. FOREIGN CORPORATIONS—APPEAL TO COURTS. That in the event any such foreign corporation shall feel aggrieved at the decision of the secretary of state relative to the fee for the filing of its articles of incorporation, or by the action of the secretary of state in fixing its annual license fee, it may, within thirty days file its notice of appeal from such order in the superior court of Thurston county, Washington, together with a statement of the grounds of its appeal and the reductions or changes in such fees sought, and the court shall proceed summarily to hear and determine the questions raised by such appeal and make and enter such order therein as to the court may seem meet and proper; And provided further, That either party may have the right of appeal from such judgment and decision to the supreme court of the State of Washington, the practice and procedure in appeals in civil cases to govern such appeals."

SUMMARY OF ARGUMENT

I

The statute, Laws of 1929, Chapter 107, Rem. Rev. Stat. 10417, as construed by the state supreme court is valid on its face, because:

(a) Every presumption is in favor of the statute's validity.

(b) Its purpose is solely to regulate public service corporations.

(c) This court is bound by the construction placed upon state statutes by the highest court of the state.

(d) A state may tax and regulate intrastate, and incidentally, interstate commerce without violating the commerce clause of the United States constitution.

(e) A state is not required to fix regulatory fees with exactness.

(f) Imposing no unequal burden on appellant, the statute does not violate the equal protection and immunity clauses of the fourteenth amendment.

(g) As its terms contain no indication of confiscation or excessiveness, it does not violate the due process clause of the fourteenth amendment.

II

The statute as construed by the state supreme court and administered by the state officers is valid because:

(a) All presumptions are in favor of the validity and regularity of public laws and the actions of public officials.

(b) The burden of proof is upon appellant and the evidence does not show a discrimination between appellant and others in similar circumstances.

(c) The evidence does not show an unreasonable or excessive fee imposed upon appellant nor upon the class to which appellant belongs, railroad companies.

(d) The evidence does not show that railroads are charged more than the reasonable expense of their regulation.

(e) The evidence actually does show that reasonable regulation of railroads in the State of Washington for the years involved cost the state $37,833.14 more than the fees imposed upon them for that purpose.

ARGUMENT

Chapter 107, Laws of 1929, Rem. Rev. Stat. of Washington, Sec. 10417, Is Valid and Violates Neither the Commerce Clause Nor the Due Process Clause of the United States Constitution.

We now wish to give attention to appellant's assignments 1, 2 and 3 (R. 106 and 107), which raise the point that the statute is void upon its face. On this point we think appellant's argument is manifestly unsound, as the statute contains nothing on its face to indicate invalidity. In considering this statute and the fee imposed thereunder, it is necessary to also consider the license tax or excise deducted from that fee by the Secretary of State.

The allocation by the Secretary of State of $985.60 against appellant as a license or privilege tax for the year of 1933 under Laws of 1929, Chapter 227, Sections 4 and 5, Rem. Rev. Stat., 3836-4 and 3836-5, was not raised in the state courts and is not questioned here. Nor could it be questioned, as appellant took no appeal from such allocation by the Secretary of State as required by Section 6 of the act, Rem. Rev. Stat., 3836-6. *Van Dyke v. School District No. 77,* 43 Wash. 235, 86 Pac. 402; *State ex rel. Board of Directors District No. 306 v. Preston,* 120 Wash. 569, 208 Pac. 47; *Utley v. St. Petersburg,* 292 U. S. 106, 78 L. Ed. 1155.

Sections 3836-4 and 3836-5 and 3836-6 of Rem. Rev. Stat., *supra,* impose a privilege or license tax upon all corporations for doing intrastate business in the State of Washington. *Pacific Tel. & Tel. Co. v. Seattle,* 172 Wash. 649, 21 Pac. (2d) 721. These sections will be read and

considered with Laws of 1929, Chapter 107, Rem. Rev. Stat., 10417, imposing the 1/10 of 1% regulatory fee.

Statutes imposing such a tax or excise are well within the police and taxing powers of the state, constitute no direct burden on interstate commerce and do not violate the United States constitution. *Atlantic Lumber Co. v. Commissioners of Corporations & Taxation*, — U. S. —, 80 L. Ed. Adv. Ops. 908, decided May 25, 1936. These sections must be read and considered with Laws of 1927, Chapter 107, Rem. Rev. Stat., 10417, *supra*, imposing the disputed regulatory fee.

When this privilege tax or license fee of $985.60 for the year of 1933 is deducted from the 1/10 of 1% regulatory fee of $3,137.04 it leaves a balance of only $2,151.44. This sum amounts to a little over 1/15th of the 1% of the gross operating revenue for regulation of a public service corporation operating within the state 1,929.19 miles of railway valued at $66,100,000.00 returning an intrastate operating revenue of $3,137,046.00 and an interstate operating revenue of $4,977,304.00 collected within the state. In view of the foregoing facts and statutes it certainly requires an enormous stretch of a grieved imagination to conclude that the law is void upon its face because of an excessive fee.

All funds exacted by the state from public service corporations under Laws of 1929, Chapter 107, Rem. Rev. Stat., 10417, go into the public service revolving fund. That fund is used solely for regulatory purposes. *Pacific Tel. & Tel. Co. v. Seattle*, 172 Wash. 649, 21 Pac. (2d) 721, which case was affirmed by this court in 291 U. S. 300, 78 L. Ed. 810. The state has the undoubted right to

charge against utilities all reasonable costs of their regulation and the burden is on appellant to point out any excessiveness in the fees imposed. *Charlotte C. & A. R. Co. v. Gibbes,* 142 U. S. 386, 35 L. Ed. 1051. In *New York v. Squire,* 145 U. S. 175, a state statute was also upheld. *Atlantic Pacific Tel. Co. v. Philadelphia,* 190 U. S. 160, is of like effect with the preceding cases. In the course of the opinion the court said:

"* * * When it is authorized only in support of police supervision, the expense of such supervision determines the amount of the charge; and, if it were possible to prove in advance the exact cost, that would be the limit of the tax. In the nature of things, that, however, is ordinarily impossible, and so the municipality is at liberty to make the charge large enough to cover any reasonable anticipated expenses. It is authorized to fix such charge in advance, and need not wait until the end of the period for which the license is granted. It may not act arbitrarily or unreasonably, but the risk may rightfully be cast upon the licensee, and the charge cannot be avoided because it subsequently appears that it was somewhat in excess of the actual expense of the supervision, nor can the licensee then recover the difference between the amount of the license and such cost.

* * * * * * * *

"We pass, therefore to consider the question of the reasonableness of this license charge. *Prima facie,* it was reasonable. *Western U. Teleg. Co. v. New Hope,* 187 U. S. 419, ante, 240, 23 Sup. Ct. Rep. 204. It devolved upon the company to show that it was not * * *."

All regularly enacted statutes are presumed to be valid. The supreme court of the State of Washington in deciding the case at bar so held, 184 Wash. 648, at 652. In so doing, it followed a long and unbroken line of its own decisions, only a small portion of which is cited in the opinion. The same rule has been repeatedly stated by the United States supreme court and applied when considering a state statute. *Powell v. Pennsylvania,* 32

L. Ed. 253, 127 U. S. 678, in which case the court quoted and cited other cases at pages 684 and 685 of the original report, as follows:

"* * * 'Every possible presumption,' Chief Justice Waite said, speaking for the court in *Sinking Fund Cases*, 99 U. S. 718 (25:501) 'is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.' See also *Fletcher v. Peck*, 10 U. S. 87, 6 Cranch 87, 128 (c:175); *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 518, 625 (4:629,656); *Livingston County v. Darlington*, 101 U. S. 407 (25:1015); *Detroit International Bridge Co. v. Corporation Tax Appeal Board*, 287 U. S. 295, 77 L. Ed. 314."

The statute involved, Rem. Rev. Stat., 10417, *supra*, contains nothing to rebut the presumption of validity interpreting it solely by its own terms. It contains nothing to indicate that the fee imposed thereby is or is not collected from or used to regulate any utility but railways. Other statutes bring other utilities within the act if they are existent within the state and regulated thereby. However, such can be established only by evidence, and we are now merely looking the statute in the face.

Even assuming for the sake of argument that the expense of regulating utilities other than railroads was paid out of the public revolving fund, still there can be no presumption that the fund was excessive or that any class of utilities required for regulation more or less than the statute commanded them to contribute to the fund. Neither is it justifiable to presume that some particular class of utility is over-charged for the benefit of the others nor that if such was the case appellants would be

the ones to suffer. No such conclusions can be gathered by a reading of the statutory terms. Nor is there any apparent discriminatory burden on public service corporations as a class. Laws of 1929, Chapter 227, Rem. Rev. Stat., Secs. 3638-4, 3638-5, *supra,* imposing a license tax on all other corporations, while in effect exempting public service corporations makes such corporations a favored class. This favored class includes the railroads, and they have no apparent cause for complaint.

Another point to be considered is that the rates, charges and services of appellants are subject to being regulated and established as to intrastate commerce by the state department of public service. Any fees imposed therefor, like other taxes, constitute an expense of operation and presumptively have been or will be absorbed in fixing the rates and charges of the utilities and are therefore immaterial at the present time. *West Ohio Gas Co. v. Public Utilities Commission of Ohio,* 294 U. S. 63, 79 L. Ed. 761.

We now wish to call attention to the cases cited by appellants in their brief.

Postal Tel. & Cable Co. v. New Hope, 192 U. S. 55, is not in point, as that turned on the question of not whether the fee was reasonable, but whether the court could reduce it and grant a less amount upon submission of the case to the jury. The court recognized the right to charge the utility with its regulation, and also recognized that in controversies involving such an imposition of taxes, or fees, the burden is upon the affirmative pleader.

State ex rel. Davis-Smith v. Clausen, 65 Wash. 156, 117 Pac. 1101, and *Mountain Timber Company v. State*

of Washington, 243 U. S. 219, cited in brief of appellant, pages 39 and 40, are merely cases sustaining the Workmen's Compensation Law of the State of Washington.

Noble State Bank v. Haskell, 219 U. S. 104, brief of appellant, page 42, affirmed the supreme court of Oklahoma in sustaining the validity of the Oklahoma statute requiring a bank deposit guaranty fund.

Foote v. Stanley, 232 U. S. 494, 58 L. Ed. 698, brief of appellant, pages 29 and 34, upon which appellant places great reliance, is not parallel to the cases at bar in any particular, and does not support the appellant's position. That case was a suit, not to recover fees paid, but to enjoin the exaction of fees in the future. The act involved was the Maryland law, imposing an inspection fee of one per cent per bushel on all oysters, including those shipped in and out of the state. All the revenue involved in the suit was derived from this inspection fee. The salary of the inspectors was fixed by the act, and in the past, $40,000 per year was exacted in fees. Two-thirds of the sum so collected was used for purposes other than inspection of the oysters in both domestic and interstate commerce. The act itself showed that the fee was excessive and was used for other purposes than inspection. The case was brought under the inspection clause of the United States constitution, which was neither pleaded nor involved in the case at bar, except in its remote effect on interstate commerce. A careful reading of the opinion discloses that the burden is only upon the proponent of the tax when the objectional facts cited are shown upon the face of the act. The opinion also shows that the case really supports the position of the State of Washington in the cases before the court as the

public service revolving fund is used solely for regulatory purposes.

In the course of the opinion, the court used the following language:

"2. Inspection necessarily involves expense, and the power to fix the fee, to cover that expense, is left primarily to the legislature, which must exercise discretion in determining the amount to be charged, since it is impossible to tell exactly how much will be realized under the future operations of any law. Besides, receipts and disbursements may so vary from time to time that the surplus of one year may be needed to supply the deficiency of another. If, therefore, the fees exceed cost by a sum not unreasonable, no question can arise as to the validity of the tax so far as the amount of the charge is concerned. And even if it appears that the sum collected is beyond what is needed for inspection expenses, the courts do not interfere, immediately upon application, because of the presumption that the legislature will reduce the fees to a proper sum.

* * * * * * * *

"In such inquiry they treat the fees fixed by the legislature for inspection proper as *prima facie* reasonable, and do not enter into any nice calculation as to the difference between cost and collection; nor will they declare the fees to be excessive unless it is made clearly to appear that they are obviously and largely beyond what is needed to pay for the inspection services rendered."

The case of *Lugo v. Suazo,* 59 Fed. (2d) 389, cited on page 32 of appellant's brief, appears to be based solely upon the *Foote* case, *supra.* It involves the validity of an act of Puerto Rico. The constitutional status of a sovereign state cannot be compared with the status of a territory and for that reason the case can be of little, if any, value. Furthermore, the funds involved were all raised by the handling of foreign coffee and were used to protect the domestic coffee industry. That is not the situation in the case at bar, where any surplus in the

public service revolving fund came in not from the railroads but from other utilities, a point which appellant is not in a position to raise. *Utah Power & Light Co. v. Pfost,* 286 U. S. 165, 76 L. Ed. 1038.

The *Foote* case was also cited by the supreme court of the United States in *Pure Oil Co. v. Minnesota,* 248 U. S. 158, 63 L. Ed. 180, where the Minnesota inspection law was affirmed. The fees collected in six years were $62,689, while the expenses of the inspection were $46,863.00.

Baer Bros. Marcantile Co. v. D. & R. G. R. Co., 233 U. S. 479, 58 L. Ed. 1055, Brief of Appellant, page 36, involved a reparation order of the Interstate Commerce Commission, and held that rates and reparations may be covered by the same order. It did not involve a state statute, nor does it throw any light upon interpreting the statute. It is of no importance in the matter at bar.

Charlotte C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. Ed. 1051, *supra,* also cited in Brief of Appellant, pages 27 and 37, is nearer in point. There a South Carolina statute imposing fees upon the railroads for all expenses of the railroad commission, including salaries of the commissioners, was sustained. The South Carolina statute was based upon the gross income, according to the mile of track in the state. If this is a proper measure, it surely cannot be successfully contended that the fee measured by the gross income of the utility is not proper, as the latter is certainly the more closely connected with equitable principles and the proportionate expense of the regulation. During the opinion the court stated:

"* * * The mode or manner of regulation is a matter of legislative discretion. When exercised through

commissioners, their services are for the benefit of the railroad corporations as well as of the public. Both are served by the required spervision over the roads and means of transportation, and there would seem to be no sound reason why the compensation of the commissioners in such case should not be met by the corporations, the operation of whose roads and the exercise of whose franchises are supervised. In exacting this there is no encroachment upon the fourteenth amendment * * *."

Appellant also cites cases from the Washington supreme court decided prior to that decision by that court in the case at bar. Such cases can have no effect upon the situation. In deciding the present case the Washington court expressed the ultimate position of that tribunal on the matter at bar, and all portions thereof. We will pay no further attention to those decisions.

Appellant also cites cases from the supreme courts of other state. These cannot possibly be of any value. All in conflict therewith are repudiated by the position of the supreme court of Washington in the decision under consideration. (184 Wash. 648, 52 Pac. (2d) 1274, R. 91.)

The supreme court of the United States, after the construction of a state statute by the highest court in the state, is concerned only with the question of whether or not such statute so construed violates the United States constitution. *Gregg Dyeing Co. v. Query,* 286 U. S. 472, 76 L. Ed. 1232; *Southern Iowa Electric Co. v. Chariton,* 255 U. S. 539, 65 L. Ed. 764; *Georgia Railway Co. v. Decatur,* 262 U. S. 432, at p. 437, 67 L. Ed. 1065; *Denney v. Pacific Telephone & Telegraph Co.,* 276 U. S. 97, 72 L. Ed. 483, and *Puget Sound Traction Co. v. Reynolds,* 244 U. S. 574; *Detroit Int. Bridge Co. v. Corp. Tax Appeal Board,* 287 U. S. 295, 77 L. Ed. 314, *supra.*

By using his cited cases appellant seeks to demonstrate that the fee imposed by the statute for regulatory purposes is excessive. In this we think appellant misconstrues the cases. The proper rule to be deducted from those and other cases is that the burden is never upon the state to show that the statute is not excessive nor discriminatory unless the statute is on its face void, confiscatory or discriminatory, which is not the case with the statutes under consideration here.

Many of appellant's cases are cited in the *Mackey Telegraph and Cable Co. v. Little Rock,* 250 U. S. 94, 63 L. Ed. 863, which case involved the regulatory license fee imposed upon telegraph companies by a municipal corporation in the state of Arkansas. It is closer in point than the *Foote* case, upon which appellant so heavily leans, because the *Foote* case involved an inspection fee under the inspection clause of the constitution while in the matter at bar that clause is not initial. This court in the *Mackey* case sustained the fee imposed by the municipality.

ON ITS FACE THE STATUTE DOES NOT IMPOSE A DIRECT BURDEN UPON INTERSTATE COMMERCE, AND DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The supreme court of this state, having held the statute under consideration to be purely regulatory in *Pacific Tel. & Tel. Co. v. Seattle,* 172 Wash. 649, *supra,* which case was affirmed by this court in 291 U. S. 300, 78 L. Ed. 810, all courts are bound by that decision.

That the state has the right to regulate and tax domestic commerce is beyond all doubt. The only restriction is that such regulation, or taxation shall not directly

burden interstate commerce. An indirect or incidental burden or interference with interstate will not vitiate the state statute. If such interference were construed to violate the commerce clause of the United States Constitution no state could function, for under the complex industrial system of modern civilization nearly every law or ordinance of a state, or municipality has some effect upon interstate commerce. This distinction is recognized by the supreme court of the United States and of the several states in cases too numerous to tabulate. Some of these cases apply to taxation, while others apply to regulation. *Underwood Typewriter Co. v. Chambelain,* 254 U. S. 113, 65 L. Ed. 165; *Graniteville Mfg. Co. v. Query,* 283 U. S. 376, 75 L. Ed. 1126.

In *Lehigh Valley Ry. Co. v. Commonwealth of Pennsylvania,* 145 U. S. 192, 36 L. Ed. 672, an excise imposed upon railroad companies according to the amount of their domestic traffic, as in the Washington statute, was affirmed by the supreme court of the United States, even though interstate commerce was carried on by the same companies over the same lines at the same time.

In *New York ex rel. Cornell Steamboat Co. v. Sohmer,* 235 U. S. 549, 59 L. Ed. 355, a statute imposing an excise of five-tenths of one per cent upon domestic commerce carried on by a steamboat company engaged in both domestic and interstate commerce was sustained.

In *Denver & Rio Grande Railroad Co. v. Denver,* 250 U. S. 241, 63 L. Ed. 958, an ordinance requiring the removal of a railroad track used in both domestic and interstate commerce, was sustained even though the removal threw a burden upon interstate commerce, the court saying:

"The situation is unusual and the ordinance deals with it in a rather practical way. Giving effect to all that appears, we are unable to say that what is required is plainly unreasonable and arbitrary."

The case of *Clark v. Poor,* 274 U. S. 554, 71 L. Ed. 1199, while involving the use of the state highways and the regulation of motor busses, recognizes the right of each state to regulate domestic, and in many instances, interstate, commerce so long as such regulation is not a direct and material burden on interstate commerce. In the course of the opinion the court said:

"There is no suggestion that the tax discriminates against interstate commerce. Nor is it suggested that the tax is so large as to obstruct interstate commerce. It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the commission in the administration or enforcement of the act; and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs."

In *Boeing Air Transport Co. v. Edelman,* 51 Fed. (2d) 130, a four cent gasoline tax was held valid for the purpose of regulating airports, notwithstanding the fact that the airplanes used no highways built by the state and were employed in interstate transportation.

Prouty v. Coyne, 55 Fed. (2d) 289, where a state license tax on cars according to weight thereof used exclusively in interstate transportation was upheld for the purpose of regulation and also maintaining of roads.

In *Continental Baking Co. v. Woodring,* 55 Fed. (2d) 347, a mileage and capacity tax upon automobiles used in interstate commerce was held good for the purpose of road maintenance and regulation.

NEITHER THE PRIVILEGE AND IMMUNITIES CLAUSES, NOR THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS VIOLATED BY THE STATUTE AS INTERPRETED BY THE WASHINGTON SUPREME COURT.

Having shown, we think, that the plaintiffs have no complaint under the commerce clause of the United States constitution, we now wish to direct the court's attention to the fourteenth amendment. We first take up those clauses prohibiting a state from abridging privileges or denying equal protection of its laws to a citizen of the United States. These clauses are violated only by unequal burdens imposed by a state. They are not applicable to excessive burdens imposed impartially upon *all* alike. *New York ex rel. Bryant v. Zimmerman,* 278 U. S. 63, 73 L. Ed. 184; *American Sugar Refining Co. v. State of Louisiana,* 179 U. S. 89, 45 L. Ed. 102.

As long as all railroads are used alike, as they are, under the statute of the state, no one of them can successfully invoke these clauses of the constitution. Had some railroads been left out and the burden imposed upon the plaintiffs, thereby narrowing the class to less than a reasonable classification, the plaintiffs might complain. Broadening the class and putting other utilities in with the railroads is no cause for complaint from the railroads, who are properly within that class. The charges are presumed to be reasonable and necessary for the regulation of the railroads. The disposition of the funds, other than those used, or necessary for the regulation of the railroads, is wholly immaterial. *Clark v. Poor,* 274 U. S. 554, 71 L. Ed. 1199, *supra.*

The due process clause of the above amendment is the only United States constitutional provision pleaded

by plaintiffs which concerns excessive charges when imposed by a state against all members of a class. Where this clause of the fourteenth amendment is invoked, as it is here, the United States courts are concerned with neither discrimination nor classification. The inquiry is narrowed to determine only whether in fact and in effect property of the complaining party is taken or used without adequate compensation. In *State Corporation Commission v. Wichita Gas Co.*, 290 U. S. 561, 78 L. Ed. 500, the court said:

"* * *. And upon the issue of confiscation *vel non* they are entitled to the independent judgments of the courts as to both law and facts. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 289, 64 L. Ed. 908, 914, 40 S. Ct. 527, P. U. R. 1920E, 814; *Bluefield Water Works & Improv. Co. v. Public Ser. Com.*, 262 U. S. 679, 689, 67 L. Ed. 1176, 1181, 43 S. Ct. 675; *United R. & E. Co. v. West*, 280 U. S. 234, 251, 74 L. Ed. 390, 411, 50 S. Ct. 123."

In *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, 72 L. Ed. 554, which, however, involved the use of the highways in interstate commerce, the court used the following language:

"That appellant is already contributing to highway maintenance is not in itself significant, for the state does not exceed its constitutional power by imposing more than one form of tax as a charge for the use of its highways in interstate commerce. It is for appellant to show that the aggregate charge bears no reasonable relation to the privilege granted."

Los Angeles G. & E. Corp. v. Railroad Com., 289 U. S. 287, 77 L. Ed. 1180, was a rate case where the due process of law was pleaded by the utility. The court, in commenting upon the application of that clause of the constitution, remarked as follows:

"* * *. When the legislative method is disclosed, it may have a definite bearing upon the validity of the result reached, but the judicial function does not go beyond the decision of the constitutional question. That question is whether the rates as fixed are confiscatory. And upon that question the complainant has the burden of proof and the court may not interfere with the exercise of the state's authortiy, unless confiscation is clearly established."

The real controversy here is whether one-tenth of one per cent of a railroad's gross revenue from domestic commerce, diminished to one-fifteenth of one per cent by deducting the license tax, does or does not unreasonably exceed the cost of railroad regulation in the state. We have pointed out that no unreasonable excess appears from the statute as a matter of law.

THE STATUTE NOT BEING VOID ON ITS FACE, THE BURDEN WAS ON APPELLANT TO SHOW AN ADMINISTRATIVE VIOLATION OF THE UNITED STATES CONSTITUTION. THE EVIDENCE DOES NOT SUSTAIN THAT BURDEN.

Appellant's assignments 4 (a), (b), (c) and (d) will be covered by our argument on this point. The position of appellant in this respect is stated in their assignment of errors (R. 107) as follows:

"(4) The supreme court of the State of Washington erred in holding and deciding that the evidence preponderated against the findings made by the trial court as to the cost of supervising and regulating railroads, * * *."

As a reading of the statutes does not show them to be unconstitutional, appellant's case must follow and the judgment of the Washington supreme court be affirmed, unless the evidence shows a violation of the United States constitution because of the actual administrative effect of the state laws. Such violation must also be clearly

established or the presumption that the statute and all administrative acts are valid will control. *Los Angeles G. & E. Corp. v. Railroad Com.*, 289 U. S. 287, 77 L. Ed. 1180; *Interstate Busses Corp. v. Holyoke Street Ry Co.*, 273 U. S. 75, 7 L. Ed. 530.

By the above assignment of error appellant objects to the Washington supreme court's decision reversing the trial court's findings. That, however, is a matter of no interest to this court. While the supreme court of the United States has appellate jurisdiction of both the law and the facts, it has no concern whatever with any controversy of the trial court's findings and conclusions or judgment. It must take the state law, the state rules of practice, the construction of the state's statutes and the ulimate conclusions of the state as it finds them unless the result violates the United States constitution.

With the above indispensable rule in mind, let us examine the facts to see, not that they do not preponderate against the findings of the trial court, but that they do not clearly preponderate against the conclusion of the state supreme court, for its judgment is the only one appealed, and, indeed, the only judgment appealable to this court.

The record at bar discloses that appellant relies principally upon a portion of a few documents admitted in evidence over respondent's objections as to their competency, relevancy and immateriality (R. 58, 60-63). The documents are the annual reports of the Department of Public Works covering the years in controversy and the Governor's inaugural address delivered at the beginning of his term of office January 16, 1929. (R.

62 and 63.) Appellant states the argument on the face of the case by setting out on page 43 of its brief, a table taken from Exhibit 5, page 78, showing $151,396.24 paid into the Public Service Revolving Fund in the year of 1933, by public service corporations other than railways and utilities. How this can prove the railroads to be over-charged is a mystery which appellant has not explained. Appellant is not competent to raise this point in behalf of the parties making the payments and who are not parties to the record. *Utah Power & Light Company v. Pfost*, 286 U. S. 165, 76 L. Ed. 1038, *supra*.

This table is followed by an excerpt from the governor's message set out in appellant's brief at page 4 (Trans. 63); the excerpt being merely a recommendation to the legislature by the governor is merely hearsay and therefore incompetent and inadmissible and should be ignored in considering the case. But even if considered, it does not support appellant's position, it merely shows that in 1929 and prior thereto the department of public works had not been self-supporting as to railroads and utilities. It does not show how much the railroads were indebted to that department for the regulating, nor does the appellant explain how such facts cause an injury to appellant.

The second paragraph of the excerpt shows that the governor wanted to make the transportation division of the department self-sustaining. Surely there is nothing illegal in such an idea of the executive. *Charlotte Etc. Railroad Co. v. Gibbes*, 142 U. S. 386, 35 L. Ed. 1051, *supra*. It also shows the recommendation to abolish the public service revolving fund. This recommendation was

admittedly not carried out by the legislature, Laws of 1929, Chapter 107, Rem. Rev. Stat., 10417, *supra,* Brief of Appellant, pages 2 and 3. Whether admissible or not, it can have not even the slightest materiality or relevancy nor effect on the outcome.

Appellant follows the portrayal of these vague matters with the statement on page 35 of its brief, to the effect that in 1933 by Chapter 192, the legislature appropriated from the public service revolving fund $430,850. That appropriation act contained in addition to what appellant stated, the following clause: "(expenditures not to exceed fees heretofore or hereafter collected.)" Omitting this clause and showing a disregarded recommendation by the governor to the legislature urging the abolishment of the public service revolving fund are no reasons for concluding or even surmising that the railroads were over-charged. Neither is the statement in appellant's brief at pages 44 and 46 that all the $224,193.95 in the public service revolving fund at the close of 1933 was spent in 1934, material to the issue. If the appellant was not over-charged, it is immaterial how the residue of the fund was afterwards expended by the state officers. *Clark v. Poor,* 274 554, 71 L. Ed. 1199, *supra.*

After introducing the documentary evidence above mentioned, appellant called to the stand Mr. Stookey who for years had been auditor of the department, and over respondent's objection (R. 64) offered his testimony, whereupon the following occurred:

"Mr. C. S. Stookey, being a witness called on behalf of plaintiff, Northern Pacific Railway Company, after having been first duly sworn, testified as follows:

"Direct examination.

"By Mr. daPonte:

"Q. Mr. Stookey, you are the auditor of the Department of Public Works?

"A. I am.

"Q. You have the pay rolls, have you, of the department for the years 1929 to date?

"A. Yes, sir, I have the transcript.

"Q. State approximately the number of employees the department had in its various divisions for the years 1929 to date. I dont care for the exact number. If it varies from month to month, just state about how it was.

"Mr. Hannan: I object to that, your Honor, please, as being incompetent, irrelevant, and immaterial. The number on pay rolls in the various departments is immaterial in the matter. I object to the introduction of the testimony.

"The Court: It seems to me the objection is well taken. The only thing we are interested in here is whether this amount that is collected is in excess of necessary inspection fees.

"Mr. daPonte: No, Your Honor, that isn't the question we have here. We aren't going into that excerpt as shown by the record. Our position is that this is a flat fee levied to pay all of these activities, and that is an invalid act on its (fol. 84) face. It is supplementary to that, and I doubt if it is necessary to my contention, but I thought for re-enforcing the argument it would be necessary to show that. I am not going into the cost of regulating railroads. It couldn't be proven. There are no records available." (R. 64 and 65.)

Thereupon the witness testified as to the employees and general operation of the department. (R. 65-70.) None of the testimony so introduced in any way tended to show an excessive charge to the railroads nor the expense of regulating such transportation companies. In fact, the appellant disclaimed all intention to do so by the following statement of its counsel, Mr. daPonte:

"I am not going into the cost of regulating railroads. It couldn't be proven. There are no records available." (R. 65.)

Not having shown an excessive charge imposed upon appellant, the Washington supreme court was correct in overruling the trial court and ordering appellant's action dismissed.

Turning now to appellant's fifth assignment (R. 108) we find errors charged on the ground that the state supreme court did not find from the evidence that the expense of the department was largely caused by activities of a non-regulatory character. It appears to us that the record discloses no evidence to justify, let alone compel, such a finding.

Proceedings for reparation of railroad over-charges (R. 70), establishing rates, regulating service and proceeding before the interstate commerce commission on interstate rates where they affect intrastate rates and service are all matters connected with railroad regulation and proper activities of the state's regulatory department. *Charlotte Etc. Railroad Co. v. Gibbes*, 142 U. S. 386, 35 L. Ed. 1051, *supra*.

In addition to this, a view of the evidence shows that the 1/10 of 1% fee reduced to 1/15 of 1% as hereinbefore explained was imposed on the railroads as a class for regulation and failed by $37,833.14 to cover the actual expense of their regulation during the five years involved. (R. 72.) In this computation made by the witness, many items of recognized regulatory expense were omitted, to-wit: No charges were made for legal services (R. 72 and 73) nor for auditing by the state auditor, nor by the department of efficiency (R. 73)

nor for the salary of the director of public works. (R. 75.) It was also shown that the regulatory expenses varied greatly from year to year. (R. 78.) The absence of such items shows that the fees might have been even higher and not have been excessive. *Pure Oil Co. v. Minnesota*, 248 U. S. 158, 63 L. Ed. 183, *supra*.

THE EVIDENCE IN THE CASE AFFIRMATIVELY SHOWS THAT THE APPELLANT WAS NOT OVERCHARGED BUT THAT IT WAS GROSSLY UNDERCHARGED BY THE STATE FOR REGULATION.

Here we will give attention to appellant's sixth and seventh assignments and discuss them together. The sixth charges error in admitting the testimony of the department's auditor, Mr. Stookey, and the seventh in the rendering judgment by the state supreme court.

Mr. Stookey, the auditor, was the only witness sworn. Appellant first called him and put in his testimony over respondent's objection. (R. 64.) Later, the same witness was called by the respondent upon the reopening of the case and his further testimony went in without objection by appellant. (R. 71-73):

"(At 2:15 p. m. on Thursday, January 3, 1935, the above entitled cases were reopened for the introduction of further testimony, and the following proceedings were had and testimony taken, to-wit):

"Mr. Hannan: Your Honor, at the reopening of the case, Your Honor ruled to permit me to introduce some testimony in defense. I call Mr. Stookey to the stand.

"Mr. C. S. Stookey, being a witness called on behalf of defendant, having been previously duly sworn, testified as follows:

"Direct examination.

"By Mr. Hannan:

"Q. You are the auditor of the department of public works? (fol. 93.)

"A. I am.

"Q. You are the man who testified for the plaintiffs here in this cause?

"A. Yes, sir.

"Q. How long have you been auditor of the department?

"A. Since June, 1920.

"Q. Mr. Stookey, have you made an examination of the records of the department for the years 1929, 1930, 1931 and 1932 and '33, in regard to the railroads?

"A. Yes, sir.

"Q. Have you made a computation as to how much the railroads have paid in those years and how much has been expended by the department on the railroad part of the Department of Public Works?

"A. Yes, sir.

"Q. Tell us what they are by years.

"A. Receipts, 1929 calendar year from the railroads, $30,640.12, and expenses chargable to railroads for the fiscal year April 1, 1929, to March 31, 1930, were $34,284.60. Receipts—(Interrupted.)

"Q. 1930?

"A. Calendar year 1930, $25,788.12; disbursements, 1930, fiscal year, $43,795.28. Receipts for 1931 calendar year, $19,953.57; disbursements for the 1931 fiscal year, $27,101.61. Receipts for the 1932 calendar year, $12,921.52; disbursements for the 1932 fiscal year, $24,856.90. Receipts for the 1933 calendar year, $12,247.58; disbursements for the 1933 fiscal year, $9,245.66.

"Q. Have you the total for all that?

"A. I have the accumulative excess of disbursements over (fol. 94) receipts for that period.

"Q. How much is it?

"A. Which amounts to $37,833.14.

"Q. Do your charges for disbursements include anything for legal services of the Attorney General's

office in regulating the railroads, or any of those other departments?

"A. No, sir, just for funds expended from our appropriations.

"Q. Did you consider anything for the consideration of the State Treasurer or State Auditor in regard to those funds in state regulation?

"A. No, sir.

"Q. Did you include anything for the auditing of the Department's books by the Department of Efficiency auditor?

"A. No, sir.

"Q. You got your figures from the books of the company?

"A. The Department of Public Works."

After cross-examination (R. 73 and 74) whereby appellant elicited no more favorable testimony from the witness his objection to the testimony was interposed. Manifestly, the objection was not timely made and of no effect whatever. After further direct and cross-examination (R. 74-81) the case was finally closed. The witness was an officer of the state and of the department charged with the regulation of public service corporations. His compilations and accounting in regard to the railroads were turned in to his superiors, and were kept as part of the public record of the office.

Appellant next argues that the above testimony introduced by the state was incompetent and should have been excluded and should now be disregarded. Appellant's brief, page 55, cites a quotation from the case of *Truax v. Corrigan,* 257 U. S. 312, 66 L. Ed. 254. A reading of that case makes manifest that it has no application to the question of admissibility or force of the evidence under discussion by appellant. In the *Truax* case, the

facts were pleaded and admitted and the case decided as a matter of law. In addition to the quotation set out in appellant's brief is found the following:

"We conclude that the demurrer in this case should have been overruled, the defendants required to answer, and that, if the evidence sustains the averments of the complaint, an injunction should issue as prayed."

On the other hand, in the case at bar all but formal allegations of the complaint were denied. (Brief of Appellant, page 7.) In view if the above distinction, appellant's quotation from the *Truax* case is of no importance and merely encumbers the record. The other authorities cited by appellant on the question of evidence, brief of appellant, page 54, are so foreign to the real point in issue that they merit no further consideration.

The testimony was properly held admissible by the supreme court of the state, whose holdings should be final on this point of the case, even though this court will, if necessary, go into the actual facts to determine whether the constitution of the United States has been violated. The testimony affirmatively and emphatically shows that legitimate regulation of the railroads cost many thousands of dollars more than the fees exacted from such railroads during the five years in issue.

Turning now to the question of the admissibility of the evidence objected to by appellant, we repeat no objection was made at the start but only after the evidence was admitted and cross-examination by appellant failed to bring out favorable facts. Manifestly, such a position as an objection to testimony was too late and therefore unavailing. Appellant then moved to strike the testimony from the record, which motion was overruled by

the trial court. (R. 74.) Appellant's petition for appeal does not raise the point or charge error upon overruling of his motion to strike the testimony, so this phase of it cannot be considered by this court.

In any event, the testimony was admissible. Underhill on Evidence, Section 142c, page 209, contains the following paragraph:

"To give an official character to a public record or register it is not essential that it should have been authorized or ordered to be kept by statute. It is the duty, if not the right, of every official to keep a record of his public transactions whenever such a practice is an appropriate and common mode of evidencing them. This record, whether required to be kept by statute or not, is a public record. The books themselves, being produced from the proper custody, should be received in evidence without authentication, unless it is affirmatively shown that they have been negligently or illegally kept."

At the trial no objection was made to the witness testifying as to his computations from the records. The motion to strike was because of hearsay. (R. 74.) Had that point been urged, the records themselves could have been put in, and not put appellee at the disadvantage that appellant seeks to have appellee placed in by this court. Under all circumstances of the case, the testimony was properly admitted and properly considered by the supreme court of the state.

The testimony affirmatively and emphatically shows that legitimate regulation of the railroads cost many thousands of dollars more than the fees exacted from such railroads during the five years in issue. However, if this testimony is inadmissible and disregarded all testimony in the case is inadmissible and must be disre-

garded. In such an event, appellant would fall back solely on the face of the statute, which is valid because of its intents and purposes as we have hereinbefore demonstrated.

CONCLUSION

The statutes involved are valid on their face, thereby leaving the burden upon the plaintiff and every presumption in favor of the state. The evidence admitted did not rebut the presumption but it did make the position of the state conclusive. No burden on interstate commerce having been shown the commerce clause of the United States was not violated. As all parties of a reasonable class with the railroads came under the statute, no due privilege was withheld and no equal protection of the laws of the state denied. Neither was the due process clause violated.

The constitution of the United States was not violated by the administration of the statutes in question. The opinion and judgment of the supreme court of the State of Washington reversing the trial court and ordering a dismissal of the actions were in all things proper and should be affirmed by this court.

Respectfully submitted,

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